DEC 5 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-709.

RIALTO THEATER COMPANY,
a Delaware Corporation, and
RICHARD F. LEWIS, JR.,

Petitioners,

v.

CITY OF WILMINGTON, a Delaware Municipal Corporation, HARRY G. HASKELL, JR., Mayor of the City of Wilmington, WILLIAM J. O'ROURKE, Safety Commissioner of the City of Wilmington, and JOHN T. McCOOL, Chief of Police of the City of Wilmington,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION.

CLEMENT C. WOOD,
202 Public Building,
Wilmington, Delaware 19801
Counsel for Respondents.

Intercontinental, 111 So. 8th St., Phila., Pa. 19106—Tel. WA 2-8711 Area Code 215

INDEX.

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	3
Reasons for Denying the Writ	4
I. The Decision Below Is Clearly Correct	4
II. There Is No Conflict of Decisions	5
III. There Is No Important Question of Federal Law	5
Conclusion	6
Order of U. S. District Court Dated May 21, 1970	7

CASES CITED.

	Page
Metzger v. Pearcy, 393 F. 2d 202 (C. A. 7)	5
Rialto Theatre Co. and Richard F. Lewis, Jr. v. City of Wilmington, 460 F. 2d 281 (1972)	1
Thompson v. City of Louisville, 362 U. S. 199	5
Tyrone Inc. v. Wilkinson, 410 F. 2d 639 (C. A. 4)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-709.

RIALTO THEATRE COMPANY, A DELAWARE CORPORATION, AND RICHARD F. LEWIS, JR.,

Petitioners,

v.

CITY OF WILMINGTON, A DELAWARE MUNICIPAL CORPORATION, HARRY G. HASKELL, JR., MAYOR OF THE CITY OF WILMINGTON, WILLIAM J. O'ROURKE, SAFETY COMMISSIONER OF THE CITY OF WILMINGTON, AND JOHN T. McCOOL, CHIEF OF POLICE OF THE CITY OF WILMINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 460 F. 2d 281 (1972) and appears in the Appendix to the Petitioner's Petition (A19).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

May a Federal Court order a litigant to keep evidence safely, originally seized but ordered returned to him (Order of March 31, 1970 App. A1 of Petition), and return said evidence to the State to aid in the prosecution of criminal offenses even though the evidence allegedly belongs to another not a party to the litigation where the litigant has not made a special issue of his alleged lack of possession of the evidence in pending State Court litigation and the alleged owner has not sought to intervene at any stage of either the State or Federal litigation in order to protect his alleged rights?

STATEMENT OF THE CASE.

The Respondents adopt the Petitioner's statement of the case except the statements in the third paragraph thereof that the films seized were licensed by the Petitioners and that a licensing agreement required their return within a very short period. There is nothing affirmative in the record to show whether this statement is true or not for the alleged licensing agreement has not been made a part of the record. Furthermore, the statement that the District Court held in substance that the return of the films to Petitioners vindicated their first amendment rights does not find support in the Court's order nor anywhere else in the record. What the District Court held on March 31, 1970 (App. A1, A2 of Petition), and again (Opinion of May 21, 1970 attached), was that the Respondents should return the seized films to the Petitioner, said films to be held by the Petitioner and to be made available to the Respondents upon request for use in the preparation for trials of criminal cases involving said films.

REASONS FOR DENYING THE WRIT.

I.

The Decision Below Is Clearly Correct.

The decision made as set forth in the lower court's opinion is a correct one and well supported by the cases as cited in the opinion (App. A19 of Petition). The alleged license is not of record, the Petitioners have made no special issue of their alleged lack of possession of the films in the pending State Court litigation and the alleged owners, nameless in the record, have not intervened to protect their rights. If indeed the Petitioner Lewis has let these films escape he did so at his peril for he was only acting as a custodian of the evidence for the Municipal Court pursuant to the District Court's order of March 31, 1970. His possession was permitted to continue only until such time as the City Solicitor required it for prosecution against him. Even this limited right of possession ceased when the City Solicitor subpoenaed the films for use in trial preparation. The trailers were subpoenaed on May 14, 1970 by the City Solicitor at which time Petitioner Lewis was subpoenaed to appear before the City Solicitor or an Assistant City Solicitor to bring the subject trailer films with him for the City Solicitor to prepare for an up-coming criminal trial. Lewis ignored the subpoena and did not appear with the trailer films nor did he give any reason for ignoring the subpoena and he did not apply for relief because the trailers were not in his possession. As a result, he is now under prosecution for contempt in the State courts. In addition, the basic charge on which Lewis was arrested in March, 1970, is still pending in the Municipal Court of the City of Wilmington.

II.

There Is No Conflict in the Decisions.

At page 4 of the Petition, the Petitioners cite *Metzger v. Pearcy*, 393 F. 2d 202 (C. A. 7) and *Tyrone Inc. v. Wilkinson*, 410 F. 2d 639 (C. A. 4) and state that in the cited cases the films ordered re-delivered to the local prosecuting authorities were owned by the exhibitors. In *Metzger*, the Plaintiff, an exhibitor, was the owner of the films and he was a party litigant. In *Tyrone*, as here, the Plaintiffs were not the owners of the films but the owner and manager of the theater in which the films were being shown. The lower court's decision was based on *Metzger* and *Tyrone* and certainly there is no conflict in the decisions. *Thompson v. City of Louisville*, 362 U. S. 199, cited by Petitioners, is inapposite. The case makes reference to there being a lack of evidentiary support for the lower courts ruling. The Petitioners say that the record here demonstrates an absence of both ownership and control. This is, of course, incorrect and points up the basic weakness of the Petition. The record is not clear and the Petitioners nor the alleged owners have done nothing to make it clear. If this Court were to issue certiorari it would constitute an interference with the pending state court proceeding contrary to the *Younger v. Harris* series.

III.

There Is No Important Question of Federal Law Involved.

The question as phrased by the Petitioners can affect only these litigants and as to them has but limited application.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

CLEMENT C. WOOD,
252 Public Building,
Wilmington, Delaware. 19801
Counsel for Respondents.

ORDER OF U. S. DISTRICT COURT.

Dated May 21, 1970.

And Now to Wit this 21st day of May, 1970, plaintiffs' application for a preliminary injunction and for other relief pursuant to its amended and supplemental complaint filed April 13, 1970, having come on for a hearing on May 18, 1970, after notice, and the Court having considered the amended and supplemental complaint, the affidavits and memoranda filed, and heard counsel for the respective parties, and finding that it has jurisdiction of this action under 28 U. S. C. §§ 1343(3), 43 U. S. C. § 1983, and under the First, Fourth and Fourteenth Amendments of the United States Constitution, Hague v. C. I. O., 307 U. S. 496 (1939); Douglas v. Jeannette, 319 U. S. 157 (1943), it is

Ordered

1. Plaintiffs' application for preliminary injunction enjoining the prosecution of plaintiff Lewis in the Municipal Court of the City of Wilmington for the violation of "An Ordinance Prohibiting Obscene Writings, Pictures, Publications, Plays, Dances, or The Exhibition Of Obscene Material" of the City of Wilmington (Sub. No. 1 to Ord. 69-166), approved January 23, 1970, is hereby denied for the following reasons that on the present record (a) plaintiffs have failed to establish that the prosecution of Lewis has been undertaken in "bad faith", Dombrowski v. Pfister, 380 U. S. 479 (1965); (b) in light of this Court's finding in par. 2, *infra*, that the Wilmington Obscenity Ordinance is on its face Constitutionally valid, the good faith prosecution of plaintiff under this valid ordinance will not result in "irreparable injury". Cameron v. Johnson, 390 U. S. 611 (1968). The Constitutional claims raised can be determined "as readily in the criminal case as in a suit for an injunction" Douglas v. Jeannette, 319 U. S. 157, 163 (1943);

Milky Way Productions, Inc. v. Leary, 305 F. S. 288 (S. D. N. Y. 1970), aff'd United States Supreme Ct. 38 L. W. 3335 (1970).

2. Plaintiffs' prayer for a declaratory judgment that the Wilmington Obscenity Ordinance is null and void on its face because it does not provide an adversary judicial hearing prior to this seizure of alleged obscene material is also denied. The challenged ordinance, which follows the language of the United States Supreme Court in Roth v. United States, 354 U. S. 476 (1957) provides an adequate standard for judging the alleged obscenity of the material in question. Grove Press Inc. v. City of Philadelphia, footnote 8, 418 F. 2d 82, 89 (C. A. 3, 1969). Concerning the failure of the ordinance to include a specific requirement of a prior adversary hearing, this Court, in the light of governing decisions by the United States Supreme Court and the Court of Appeals for this Circuit, already has determined that such a prior adversary hearing is necessary before material alleged to be obscene can be seized. A Quantity of Books v. Kansas, 378 U. S. 205 (1964); Cambist Films, Inc. v. Duggan, 420 F. 2d 687 (C. A. 3, 1969). There is no reason to expect that the Delaware state courts henceforth, after having the opportunity to consider the issues raised by plaintiffs, will not abide by the Constitutional requirement that an adversary hearing be held before seizing allegedly obscene material. The failure to include the requirement of a prior adversary hearing in the ordinance does not render the ordinance invalid because the State courts can be expected to fashion appropriate procedures to satisfy the Constitutional requirement of a prior adversary hearing. Gable v. Jenkins, 309 F. Supp. 998, footnote 3 (N. D. Ga. 1969), aff'd U. S. Supreme Ct. 38 L. W. 3401 (1970).

3. Plaintiffs' request to amend paragraph 3 of this Court's order of March 31, 1970, as further clarified by

order of this Court dated April 28, 1970, is hereby denied. Plaintiffs have already taken an interlocutory appeal from that paragraph of the Court's order; such filing of an appeal removes the jurisdiction of this Court to modify the order. Plant Economy Inc. v. Mirror Insulation Co., 308 F. 2d 275 (C. A. 3, 1962); Keohane v. Swarco, Inc., 320 F. 2d 429 (C. A. 6, 1963); 9 Moore, Federal Practice, p. 734. While lacking the power to modify the order, the Court should emphasize again, as it did in the order of April 28, 1970, that this Court has in no way ruled on the admissibility of the film trailers in any state court proceeding. Further, it was not the intention of the Court in its prior order to intervene affirmatively in the prosecution of the state criminal action. Rather, the intent was to insure that the plaintiff would take no affirmative step to place the film trailers in question beyond the reach of the state courts of Delaware.

JAMES L. LATCHUM,
United States District Judge.